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MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. ~~72-714~~

CALIFORNIA,

Petitioner,

vs.

THE MUNICIPAL COURT FOR THE SACRAMENTO MUNICIPAL COURT DISTRICT OF SACRAMENTO COUNTY, et al.,

Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District

PETITION FOR WRIT OF CERTIORARI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No._____

STATE OF CALIFORNIA, *Petitioner,*

vs.

MICHAEL L. ALFORD, *Respondent.*

On Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District

PETITION FOR WRIT OF CERTIORARI

Petitioner State of California, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeal of the State of California, Third Appellate District, directing the Superior Court to issue a peremptory writ of prohibition, said judgment becoming the final judgment in the case upon the denial of a petition for hearing by the Supreme Court of the State of California on August 16, 1972.

Opinions Below

The opinion of the California Court of Appeal, Third Appellate District, a copy of which is set forth as Appendix A to this Petition, is reported as *Alford* v. *Municipal Court* (1972) 26 Cal.App.3d 244 [102 Cal.

Rptr. 667]. A copy of the unpublished opinion of the California Superior Court, County of Sacramento, denying respondent's petition for a peremptory writ of prohibition, is set forth as Appendix B. A copy of the order of the California Supreme Court denying petitioner's petition for hearing, is set forth as Appendix C.

Jurisdiction

The judgment of the California Court of Appeal, Third Appellate District, which is sought to be reviewed, was entered on June 21, 1972. A timely petition for hearing was filed with the California Supreme Court and said petition was denied by that court on August 16, 1972. The present petition for writ of certiorari is being filed within ninety (90) days of the aforementioned order of the California Supreme Court.

Petitioner invokes the jurisdiction of This Court under Title 28, United States Code, section 1257(3), since a right has been especially set up and claimed under the Constitution of the United States.

Questions Presented

Whether section 611 of the California Military and Veterans Code, which defines "Flag" as "every picture or representation [of a flag], made of any substance, or represented on any substance . . . and every picture or representation which shows the design thereof." is overbroad under the United States Constitution.

Constitution and Statutes Involved

United States Constitution, Amendment I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

United States Constitution, Amendment XIV [Section 1]:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Military and Veterans Code, Section 611:[1]

"(a) 'Flag,' as used in this division, means the State Flag of California and the Flag of the United States, as defined in this section.

"(b) 'State Flag of California' includes any flag, standard, color, or ensign authorized by the laws of

[1] The statutory language at the time of the offense is located at page 3 of the Appendix. The language was amended in 1970 to read as stated above. The Court of Appeal specifically noted that the language change was of no moment to its decision and that its decision embraces current statutory language. [Appendix, p. 1.]

this state, and every picture or representation thereof, of any size, made of any substance, or represented on any substance evidently purporting to be any such flag, standard, color, or ensign of this state, and every picture or representation which shows the design thereof.

"(c) 'Flag of the United States' includes any flag, standard, colors, or ensign authorized by the laws of the United States or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America."

California Military and Veterans Code, Section 614:[2]

"A person is guilty of a misdemeanor who knowingly casts contempt upon any Flag of the United States or of this state by publicly mutilating, defacing, defiling, burning, or trampling upon it."

Statement Of The Case

On May 26, 1970, the District Attorney of Sacramento County filed in the Municipal Court of the Sacramento Municipal Court District, County of Sacramento, State of California, a complaint charging respondent with violation of the California Military and Veterans Code section 614(d) [3] [Cl. Tr. p. 2].

On August 11, 1970, respondent demurred to the complaint on the ground that the court lacked jurisdiction of the offense and that the facts stated in the complaint did not constitute a public offense because section 614(d) of the Military and Veterans Code was unconstitutional [Cl. Tr. p. 2].

On August 17, 1970, the Municipal Court overruled the demurrer and set the matter for trial [Cl. Tr. p. 2].

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[2] The statutory language at the time of the offense was found in Military and Veterans Code section 614(d), which read: "A person is guilty of a misdemeanor who . . . (p)ublicly mutilates, defaces, defiles, or tramples any such [United States or California] flag." The language was amended in 1970 to read as stated above. The Court of Appeal specifically noted that the language change was of no moment to its decision and that its decision embraces current statutory language. [Appendix, p. 1.]

[3] The complaint and affidavit in support of the arrest warrant charged respondent with the act of burning a United States flag. These documents are not currently part of the record.

On August 31, 1970, respondent filed a petition for writ of prohibition in the Superior Court [Cl. Tr. pp. 1–9]. On November 12, 1970, the Court denied respondent's petition for writ of prohibition by written opinion [Cl. Tr. pp. 16–19].

On November 19, 1970, respondent filed a notice of appeal to the Court of Appeal of the State of California, Third Appellate District [Cl. Tr. p. 20].

On June 21, 1972, the Court of Appeal, Third Appellate District, by published opinion, reversed the Superior Court order denying the writ and directed the lower court to issue a peremptory writ of prohibition [Appendix A].

On July 28, 1972, petitioner filed with the California Supreme Court a petition for hearing. Hearing was denied on August 16, 1972 [Appendix C].

No testimony has yet been taken in this case. Therefore, the case is without a factual record.

REASONS WHY A WRIT OF CERTIORARI SHOULD BE GRANTED

I

The California Court of Appeal's Holding That the California Flag Definition Statute Is Overbroad Adversely Affects the Nearly Identical Federal Statute and the Similar Statutes in Forty States.

The California Court of Appeal held the flag definition statute, section 611 of the Military and Veterans Code, unconstitutional as being overbroad. The California definition is identical in all material respects to 18 U.S.C. 700, the federal flag desecration

statute (See Appendix D). The California definition is also identical in all material respects to the Uniform Flag Act definition statute which has been adopted by at least fifteen states (See Appendix E).[4] Furthermore, twenty-five additional states have similar flag desecration statutes, which include flag definitions similar to the California statute (See Uniform Laws Annotated Vol. 9B., p. 48).

It is apparent that the decision below necessarily questions the validity of the federal statute and the flag desecration statutes of forty states. Therefore, the question raised is sufficiently important to warrant review pursuant to Rule 19 of the United States Supreme Court Rules.

II

Military and Veterans Code Section 611 Which Defines "Flag" to Include Pictures or Representations of a Flag Is Not Overbroad.

Section 611 provided in pertinent part at the time respondent was charged that a United States or California flag includes "every picture or representation [of a flag] . . . made of any substance, or represented on any substance . . . and every picture or representation which shows the design thereof."

Section 614(d) provided that a person is guilty of a misdemeanor who "publicly mutilates, defaces, defiles, or tramples any such flag."

[4] Uniform Laws Annotated, Vol. 9B, page 48 states that the following states have adopted the Uniform Flag Act: Arizona, Louisiana, Maine, Maryland, Michigan, Mississippi, New York, Pennsylvania, Rhode Island, South Dakota, Tennessee, Vermont, Virginia, Washington, Wisconsin.

The Court below held that the aforequoted definition of "flag" was overbroad on its face because it includes all types of American-flag-depicted articles.

The Court overturned, on the constitutional ground of overbreadth, a statute which is virtually identical to other state flag definition statutes, and the federal statute defining "flag." A California Superior court in *People* v. *Cowgill* (1969) 274 Cal.App.2d Supp. 923 [78 Cal.Rptr. 853], *cert. den.* (1970) 396 U.S. 371, 24 L.Ed.2d 590, 90 S.Ct. 613, recognized the magnitude of the issue when it stated:

> "We are here faced with not only the deliberate act of our own Legislature but with similar acts adopted by the legislatures of the other 49 states and by the Congress of the United States. Every state and the United States Congress has passed flag desecration acts in one form or another. See Chief Justice Warren dissenting in *Street* v. *New York* [citation]. The thought of overturning such uniform legislative pronouncements except in case of a clear, compelling and unmistakable constitutional mandate should cause a court to pause. (See *Halter* v. *Nebraska* [citation].)" (fn. 2, p. 925.)

The overbreadth doctrine invoked by the California Court is a legal concept formulated by this court, which allows a defendant in a criminal case to challenge a criminal statute on its face as unconstitutionally overbroad if it "does not aim specifically at evils within the allowable area of state control, but on

the contrary sweeps within its ambit other activities" which are protected by the First Amendment. *Thornhill* v. *Alabama* (1940) 310 U.S. 88, 97, 60 S.Ct. 736, 742, 84 L.Ed. 1093. The doctrine has been employed by the federal courts with extreme caution and only when the facts of a particular case require application of the doctrine to prevent application of a criminal statute to privileged conduct. *Street* v. *New York* (1969) 394 U.S. 576 [89 S.Ct. 1354, 22 L.Ed.2d 572]; *Joyce* v. *United States* (D.C.Cir. 1971) 454 F.2d 971, 984–985; *Hoffman* v. *United States* (D.C. Cir. 1971), 445 F.2d 226, 229; *Sutherland* v. *DeWulf* (S.D. Ill. 1971), 323 F.Supp. 740, 746–749.

The language of the Court of Appeal in *Joyce* v. *United States, supra,* 454 F.2d 971, at pages 984 and 985 is applicable to the instant case:

> "In reality, appellant's contentions in this regard are based on his overly-broad reading of a narrowly-drawn statute. As pointed out elsewhere in this opinion, the statute limits itself to proscribed conduct and does not trespass in the area of speech *per se*. Since conduct alone is proscribed, the statute is not made overly broad by the possibility that the conduct it prohibits frequently may be accompanied by speech, . . ."
>
> ". . .
>
> "Since the statute defines the proscribed conduct with acceptable precision and since, in the absence of any evidence to the contrary, we are bound to assume that those charged with its enforcement will do so according to its plain terms, appellant's attack must fail. To be sure, situations may arise

in which there is some difficulty in determining whether specific activity is, or could constitutionally be, within the sweep of the Act's prohibitions. The fact that marginal situations are bound to exist, however, does not serve to make the Act unconstitutional."

In *Hoffman* v. *United States, supra,* 445 F.2d 226, 229, the United States Court of Appeals, District of Columbia Circuit, found it unnecessary to apply the overbreadth doctrine. The defendant in that case appeared before a Congressional Committee wearing a shirt which, while not actually a flag of the United States, resembled the flag sufficiently to come within the terms of the statute. Pinned to the shirt were two buttons, one stating "Wallace for President, Stand Up for America," and the other stated "Vote Pig Yippee Sixty-Eight." Instead of finding either the federal desecration statute or the federal flag definition statute unconstitutional as being overbroad, the court construed the defendant's act as not constituting desecration by stating:

> "We find in this record no conduct of the sort which Congress condemned as criminal. The wearing of the shirt was not a physical mutilation, defacement, or defilement of the flag as those words are used in the statute; nor were the two buttons pinned on the shirt." (p. 229.)

As a footnote to this statement the Court explained its reasoning on construing the defendant's acts not to be within the language of the flag desecration statute, in pertinent part, as follows:

". . . when the injury is not to the flag itself but to a simulated design, it may well be that the proof of violation must be clearer than if the flag itself were desecrated. The average person naturally is more respectful in his use of the flag itself than of some of the many types of semblances of the flag." (footnote 9, p. 229.)

Thus, the District of Columbia Circuit Court considers the federal flag definition statute, 18 U.S.C. § 700, which also includes "pictures and representations" as flags, as not being in violation of the overbreadth doctrine.

Likewise, in *Sutherland* v. *DeWulf, supra,* 323 F.Supp. 740, 746–749, the United States District Court for the Southern District of Illinois, taking its cue from the Supreme Court case of *Street* v. *New York, supra,* 394 U.S. 576, held that the Illinois flag desecration statute, which reads similarly to section 614(d), was not subject to the overbreadth doctrine. The court indicated its reluctance to employ the doctrine and stated that it should not be applied in a particular case unless the facts of the case require it. The following language is pertinent to the case at bar:

"In the case at hand, this court has already determined that the act for which the plaintiffs have been indicted is not privileged conduct and may be constitutionally punished by the State. *We may assume, arguendo, that the statutory provision challenged in this case is susceptible of sweeping and improper application.* That assumption would also apply to the statutory provision found in *Street.* It would seem to this court to be an anomaly, indeed, to apply the overbreadth doctrine in

this case to void the statute where conduct of the parties challenging the statute is clearly *not* privileged, but to find the doctrine not applied in *Street* where the conduct of the person challenging a nearly identical statute was privileged. *It simply does not make sense to this court to apply the doctrine where the activity is unprivileged, when it was not applied by the Supreme Court (even though raised and considered) in a similar case where part of the activity involved was found constitutionally protected.*

"The majority opinion in *Street* gave no indication of why the overbreadth doctrine was not applied there. This court does not presume to say, but it is clear that it was not an oversight. It may be that the Supreme Court considered the statute involved in *Street* to be severable. This court believes that the provisions of the statute challenged there, as well as those of the statute here, could be *easily severed and narrowed through the excise of invalid applications. A statute should not fall in toto when it can readily be truncated to adhere to constitutional limits. Perhaps the Street opinion is a recognition that current statements of the overbreadth doctrine are themselves overbroad.* Any court should avert when reasonably possible the confrontation of judicial and legislative powers which arise when a law is held void on its face. *A court should not decide constitutional questions which are not at least directly related to the specific circumstances before it.* In any event, the clear implication of *Street* which this court sees is that the overbreadth doctrine is simply not applicable to a statutory provision like the one before this court.

The four dissenters in *Street* likewise, quite apparently did not consider that the case was a proper one for the application of the overbreadth doctrine. The Court was apparently unanimous on this point." (pp. 746–749, emphasis added.)

Thus, with no record before it, the Court refused to find the Illinois flag desecration statute void on its face as being overbroad. Although the Court did not consider the Illinois flag definition statute, the aforequoted principles are applicable in the instant case.

It is noteworthy that in most of the reported flag desecration cases, which are now numerous, the issue of overbreadth with respect to the flag definition statutes has not been raised. See, e.g., *People* v. *Keough* (N.Y. 1972) 329 N.Y.S.2d 80; *State* v. *Hodson* (N.J. 1972) 289 A.2d 635; *State* v. *Zimmelman* (N.J. 1972) 287 A.2d 474; *Commonwealth* v. *Goguen* (Mass. 1972) 279 N.E.2d 666; *People* v. *Cowgill, supra,* 274 Cal.App. 2d Supp. 923; *People* v. *Radich* (N.Y. 1967) 279 N.Y.S.2d 680; *Hodson* v. *Buckson* (Del. 1970) 310 F.Supp. 528; *State* v. *Schlueter* (N.J. 1941) 23 A.2d 249; *Hinton* v. *State* (Ga. 1967) 154 S.E.2d 246; *People* v. *Von Rosen* (Ill. 1958) 147 N.E.2d 327; *United States* v. *Ferguson* (N.D. Cal. 1969) 302 F.Supp. 1111; *State* v. *Saionz* (Ohio 1970) 261 N.E. 2d 135. As in *Street* v. *New York,* if counsel raises the issue of overbreadth at all, it is that the flag desecration statute, not the flag definition statute, is overbroad. Likewise, courts have not seen fit to find fault with the flag definition statutes since this issue has not been raised in most of the reported cases.

The *Street* decision clearly indicates that the action of the Court of Appeal in voiding the entire flag definition statute was erroneous. Justice Harlan writing for the majority stated, in pertinent part:

> "First, he claims that § 1425, subd. 16, par. d. is overbroad, both on its face and as applied, because the section makes it a crime 'publicly [to] defy . . . or cast contempt upon [an American flag] *by words* . . .' (Emphasis added.) . . . we hold that § 1425, subd. 16, par. d., was *unconstitutionally applied* in appellant's case because it permitted him to be punished merely for speaking defiant or contemptuous words about the American flag." (Emphasis added.) (pp. 580–581.) [5]

The Court below, after noting that the Supreme Court in *Street* employed unconstitutional application rather than overbreadth, recognized the fact that they were not following the lead of the Supreme Court (Appendix, p. 6).

The definition of "flag," as stated in section 611, is not unconstitutionally overbroad if it is read in conjunction with the flag desecration statute, section 614. Certainly, a picture or representation of a flag is not due the respect that an actual flag is due. Therefore, acts in desecration of semblances of flags must be more disrespectful and contemptuous than acts which constitute desecration of actual flags. Thus, if the desecration and definition-of-the-flag statutes are read and

[5] The New York statutory language is similar to section 614 except for the "words" language. It reads in pertinent part: "Publicly mutilate, deface, defile, or defy, trample upon, cast contempt upon either by words or act."

applied together to facts in particular cases, there is no danger that permissible conduct will result in a conviction for flag desecration.

Assuming, *arguendo,* that it is possible to construe sections 611 and 614 together in such a manner as to make the constitutional vice of overbreadth applicable, the Court below should have given the statutes a narrower construction to avoid any constitutional infirmity. *Ashwander* v. *T.V.A.* (1936) 297 U.S. 288, 341, 345–348 [80 L.Ed. 688, 707, 56 S.Ct. 466].

Conclusion

The Court of Appeal acknowledges in its decision the conflict with the California case of *People* v. *Cowgill, supra* [Appendix A, p. 7]. The Court also acknowledged that *Street* v. *New York, supra,* indicates that This Court might also disagree with their decision [Appendix A, p. 6]. The trepidation of the Court is understandable in view of the fact that California's definition of "flag" is identical in all material respects to the federal definition found in 18 U.S.C. 700 and is identical or similar to the definitions of flag found in the statutes of forty other states. The Court was apparently unable to find any other state or federal decision in agreement with its conclusion, although the cases cited *infra* hold that flag desecration statutes identical to the California statutes are not subject to the overbreadth doctrine.

In view of the conflict caused by the decision in the Court below, and because of the taint on identical or similar federal and state statutes, petitioner submits

that a writ of certiorari should issue to review the decision of the California Court of Appeal.

Respectfully submitted,

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APPENDIX A

Opinion of the Court of Appeal of the State of California

CERTIFIED FOR PUBLICATION

In the Court of Appeal of the State of California in and for the Third Appellate District (Sacramento)

MICHAEL L. ALFORD, *Petitioner and Appellant,* v. THE MUNICIPAL COURT FOR THE SACRAMENTO MUNICIPAL COURT DISTRICT OF SACRAMENTO COUNTY, *Respondent,* THE PEOPLE OF THE STATE OF CALIFORNIA, *Real Party in Interest.*	3 Civil No. 12951 (Sup. Ct. No. 205058) FILED June 21, 1972

On May 26, 1970, a complaint was filed charging petitioner with a violation of section 614, subdivision (d), of the Military and Veterans Code.[1] That section provided at the time: "A person is guilty of a misdemeanor who:

"

"(d) Publicly mutilates, defaces, defiles, or tramples any such flag." The words "any such flag" refer to Military and Veterans Code section 611 where, at the same time, a flag was defined as follows: ". . .

[1] All code references herein are to the Military and Veterans Code. In respects not here relevant, sections 611 and 614 have been amended by Chapter 1364 of the Statutes of 1970.

every flag, standard, color, or ensign authorized by the laws of the United States or of this State, and every picture or representation thereof, of any size, made of any substance, or represented on any substance evidently purporting to be any such flag, standard, color, or ensign of the United States or of this State, and every picture or representation which shows the design thereof."

Petitioner Alford demurred to the complaint. The municipal court overruled the demurrer. Alford unsuccessfully sought prohibition in the superior court and appealed to this court. Of Alford's several grounds as to the reason the statutes are unconstitutional, this court reaches the conclusion that said code section 614, subdivision (d), as defined by section 611 is unconstitutional because it is void for overbreadth.

THE LAW APPLICABLE

Section 614, subdivision (d), cannot be read in isolation. It refers to "such flag" which has been defined by section 611. Both sections must be considered together.

Section 614, subdivision (d), uses the words "mutilates, defaces, defiles, or tramples. . . ." In Webster's New International Dictionary, Second Edition (to which reference is made for closer definition), these words have a similarity of meaning—one which effectually evokes the same picture. The Legislature did not intend to cover non-verbal conduct solely. (Especially we note the dictionary definition of "trample" includes "to *trample* . . . upon one's feelings," an act seemingly performed in a contemptuous or ruthless fashion by words.) In sum we conclude that the Legislature intended the use of words as not a necessary but as an included adjunct of punishable conduct;

as when one, for example, marks a vile epithet upon a flag.

It is in the definition of flag, however, stated in section 611, that overbreadth occurs and here it runs rampant. "Flag" is defined to include "every picture or representation [of a flag], made of any subtance, or represented on any substance . . . and every picture or representation which shows the design thereof." The flags so referred to are the United States flag and the flag of California.

The limits of the "overbreadth" trumpeted by the language used in section 611 is fixed only by the limits of one's imagination. Three out of thousands of American-flag-depicted articles will suffice as illustrations: (1) The decals on the back windows of the automobiles of motorists, (2) a martini toothpick mounted with a flag designed to spear an olive, and (3) a picnic napkin decorated with a flag and intended for the garbage can after use. All of these come within the unequivocal unambiguous terms of section 611 as acts made punishable by section 614, subdivision (d).

We will wield a broad brush but nevertheless a firm one in denouncing the legislative attempt to force upon citizens a love for any particular state. That it cannot accomplish without doing violence to the First Amendment. Loyalty to the state of one's residence is a usual and desirable social behavior. But legislative prohibition of defacement of a state flag has a First Amendment implication. Any person has the right to dislike the state within which he lives and to say so.

In *Castro* v. *Superior Court* (1970) 9 Cal.App.3d 675, the court dismissed the effect of overbreadth in cases where the question of First Amendment impli-

cations is present. In *Castro* it is stated on pages 683–684:

"[S]ince we are dealing with First Amendment right, '[b]road prophylactic rules . . . are suspect' and '[p]recision of regulation must be the touchstone in an area so closely touching our most precious freedoms.' (*N.A.A.C.P.* v. *Button*, 371 U.S. 415, 438 [9 L.Ed. 2d 405, 421, 83 S.Ct. 328]; see also *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 682 [20 L.Ed.2d 225, 230, 88 S.Ct. 1298]; *Ashton* v. *Kentucky*, 384 U.S. 195 [16 L.Ed.2d 469, 86 S.Ct. 1407]; *Cantwell* v. *Connecticut*, 310 U.S. 296, 307 [84 L.Ed. 1213, 1219, 60 S.Ct. 900, 128 A.L.R. 1352]; *Burton* v. *Municipal Court*, 68 Cal.2d 684, 691 [68 Cal.Rptr. 721, 441 P.2d 25]; *In re Berry*, 68 Cal.2d 137, 155 [65 Cal.Rptr. 273, 436 P.2d 273]; *In re Bell*, 19 Cal.2d 488, 496–497 [122 P.2d 22].) 'Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' (*N.A.A.C.P.* v. *Button*, *supra*, 371 U.S. at p. 433 [9 L.Ed.2d at P. 418].) Standards laid down must be in 'terms susceptible of objective measurement.' (*Cramp* v. *Board of Public Instruction*, 368 U.S. 278, 286 [7 L.Ed.2d 285, 291, 82 S.Ct. 275].) Finally and, in this particular case, most vitally, the regulation must not be of such a nature as to freighten those coming within its sweep into limiting 'their behavior to that which is unquestionably safe.' (*Keyishian* v. *Board of Regents of New York*, 385 U.S. 589, 609 [17 L.Ed.2d 629, 644, 87 S.Ct. 675]; see also *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 [14 L.Ed.2d 22, 28, 85 S.Ct. 1116]; *Shelton* v. *Tucker*, 364 U.S. 479, 487 [5 L.Ed.2d 231, 236, 82 S.Ct. 147].)

"As our own Supreme Court said quite recently in *In re Kay*, 1 Cal.3d 930, 941 [83 Cal.Rptr. 686, 464

P.2d 142]: 'We recognize, of course, that because "the 'threat of sanctions may deter almost as potently as the application of sanctions' " (*Burton*) v. *Municipal Court* (1968) 68 Cal.2d 684, 691 [68 Cal.Rptr. 721, 441 P.2d 281]), "constitutionally permissible restrictions upon the exercise of First Amendment rights . . . must be drawn with a narrow specificity calculated to prevent repression of expressive activities as to which restriction is constitutionally forbidden." (*In re Berry* (1968) 68 Cal.2d 137, 155 [65 Cal.Rptr. 273, 436 P.2d 273]; see, e.g., *Dombrowski* v. *Pfister* (1965) 380 U.S. 479, 486–487 [14 L.Ed.2d 22, 28–29, 85 S.Ct. 1116]; *NAACP* v. *Button* (1963) 371 U.S. 415, 432–433 [9 L.Ed.2d 405, 417–418, 83 S.Ct. 328].)' "

Our Supreme Court has said substantially the same thing and it has cited a number of the same cases in *Fort* v. *Civil Service Commission* (1964) 61 Cal.2d 331 at page 337. We learn two lessons from the cases quoted and from the cases cited in the cases quoted in that decision and in *Castro, supra:* When a statute involves a First Amendment right and it is being tested for overbreadth (1) it will not do to say in a given case that a statute or statutes under review may be constitutional sometimes, and for some purposes, and void otherwise. Such statutes are valid always or they are altogether void; (2) reasonable strictness of interpretation must be applied by the courts. Here it would be an impermissible stretching of judicial latitude to hold (to use the illustrations referred to above) that the superimposition of a peace symbol on an American flag automobile decal (see *Crosson* v. *Silver* (D.Ariz. 1970) 319 F.Supp. 1084, 1089 (three-judge court)), or the flag's defacement by mutilating a cocktail toothpick adorned in that way, or the deliberate trampling of a picnic napkin embellished with

a picture of the flag could put the actor into potential jeopardy as a miscreant. The statute is unconstitutionally overbroad. We so hold.

There are many flag desecration cases. (See: the annotation of cases compiled at 22 L.Ed.2d. p. 572 et seq.) Not all of these cases are consistent. The most recent case of the United States Supreme Court that has been called to our attention is the five-to-four decision in *Street* v. *New York* (1969) 394 U.S. 576 [22 L.Ed.2d 572].

The holding of the majority in *Street* is stated (on p. 581 of 394 U.S.): "[W]e hold that [the New York statute there involved] was unconstitutionally applied in appellant's case because it permitted him to be punished merely for speaking defiant or contemptuous words about the American flag." That holding was in a case where the appellant had, after the assassination of James Meredith, both burned the American flag and had said, "We don't need no damn flag," and "If they let that happen to Meredith we don't need an American flag." The reasons why the majority considered those words, as distinguished from the act of burning the flag, to be within the proper scope of the First Amendment are, to this court, abstruse and we defer explanation to the language of the separate dissenting opinions of Chief Justice Warren, and justices Black, White, and Fortas. *This court cannot, without conviction, say that the High Court would have found the California statute unconstitutional on the same ground.* The decision was on appeal after trial and the point upon which we base our opinion was not reached. Had it been reached on the facts of *that* case and on the basis of the California statutes, we can see no reason why the United States Supreme Court would have sidetracked such cases as *N.A.A.C.P.*

v. *Button* (1963) 371 U.S. 415 [9 L.Ed.2d 405], and others.

Flag desecration cases appear to be rare in California. Only one has been cited to us. *People* v. *Cowgill* (1969) 274 Cal.App.2d Supp. 923, a decision of the appellate department of the Superior Court of Los Angeles, held that section 614, subdivision (d) was constitutional. (Section 611 was not referred to.) *Street* v. *New York, supra,* 394 U.S. 581, was cited but it was held that because section 614, subdivision (d) does not expressly refer to words but solely to acts, words were not contemplated, only mute desecration. For reasons which we have explained above, we disagree with *Cowgill, supra.*

The order denying the writ is reversed with directions to the superior court to issue a peremptory writ of prohibition.

(CERTIFIED FOR PUBLICATION.)

PIERCE, J.*

We concur:

REGAN, Acting P.J.
JANES, J.

* Retired Presiding Justice of the Court of Appeal sitting under assignment by the Chairman of the Judicial Council.

APPENDIX B

In the Superior Court of the State of California in and for the County of Sacramento

MICHAEL L. ALFORD, *Petitioner,* vs. THE MUNICIPAL COURT OF THE SACRAMENTO MUNICIPAL COURT DISTRICT, *Respondent,* AND THE PEOPLE OF THE STATE OF CALIFORNIA BY THEIR ATTORNEY, THE DISTRICT ATTORNEY FOR THE COUNTY OF SACRAMENTO, *Real Party in Interest.*	NO. 205058 Dept. 9 RULING ON MOTION FOR ISSUANCE OF PEREMPTORY WRIT (Unpublished) FILED Nov. 1, 1970

In this motion petitioner is seeking a Peremptory Writ of Prohibition against the Municipal Court to prevent his prosecution for a Violation of Section 614(d) of the Military and Veterans Code which provides that it is a misdemeanor for one who "Publicly mutilates, defaces, defiles or tramples any such flag" (flag of the United States or of this State). It is the contention of petitioner that said statute is unconstitutional in that it violates his First Amendment rights to freedom of expression and that the instant case is controlled by the rationale of *Hodson* vs. *Buckson* (1970) 310 F. Supp. 528, wherein a three judge Federal Court decided that a Delaware State Statute providing that "whoever publicly mutilates, defaces, defiles, tramples upon or casts contempt either by word or act, upon (the American flag) shall be fined not more than $100.00 or imprisoned not

more than 30 days or both" was unconstitutional because it regulated First Amendment expressions protected by the Constitution by so broad a statute that it struck at expression where no governmental interest was served other than the proscription of expression and the Court held that:

> "The failure of the legislature to regulate with particularity and specificity in this not too clearly charged area of First Amendment rights poses a danger of chilling vigorous and important debate and compels the Court to hold the statute unconstitutional."

The Court observed that under the Delaware statute "any act which casts contempt upon or defiles the flag, whether affecting it physically or not, is potentially illegal. Gestures or salutes which identify unpopular or controversial groups may apparently be forbidden and thus the Court held that the Delaware statute was capable of an application so sweeping and improper that even if some of its goals may constitutionally be reached it must fail in its entirety, lest protected expressions be deterred by fear of prosecution."

The California statute does not contain the provision "cast contempt upon either by word or act" and hence is limited to "acts" and the question arises does a state have power to protect the flag from acts of desecration and disgrace and this Court answers that question in the affirmative. In *People* vs. *Cowgill* 274 ACA Supp. 174 (May 1969) the Appellate Department of the Superior Court of Los Angeles made the same judgment holding that the states have a legitimate state interest in protection of the flag as a means of preventing violence and maintaining public order for as that Court observed citing from

Halter vs. *Nebraska* (1906) 205 U.S. 34, "it has often occurred that insults to a flag have been the cause of war, and indignities put upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot".

In *Street* vs. *New York* 394 U. S. 576, the Supreme Court in holding that a statute similar to the Delaware statute was unconstitutional in that one could be punished for desecrating the flag by the use of words alone did not reach the issue of desecration by the use of conduct alone. However, four of the judges had no doubt that the state could punish the act of burning the flag. And in *United States* vs. *Ferguson* (1969) 302 F.Supp. (1111) the Court upheld a Federal statute identical in form to Section 614(d) holding that the government had the power to select a national symbol or flag and that the power to select a flag carries with it the power to preserve the loyalty and patriotism represented by the flag; that the statute was not enacted to curtail speech. All patriotic and well meaning people would deplore disrespect for our flag and it would seem to this Court that the state has a legitimate state interest in preserving the loyalty and patriotism represented by the American flag and at the same time preventing any breach of the peace which might result from acts of desecration performed upon it and that any interference with First Amendment rights incidental thereto are minimal and within reasonable and legitimate constitutionally permissible limits. (*United States* vs. *O'Brien,* 391 U.S. 367.)

For these reasons the Court hereby denies petitioner's motion for a Peremptory Writ of Prohibition.

DATED: NOV 12, 1970.

/s/ WILLIAM M. GALLAGHER
Presiding Judge of the Superior Court

APPENDIX C

Order Denying Hearing

In the Supreme Court of the State of California, in Bank.

Alford v. Municipal Court, et al., 3 Civ. 12951.

Filed August 17, 1972.

Petition of Real Party in Interest for hearing denied.

McComb, J., is of the opinion that petition should be granted.

Wright
Chief Justice

APPENDIX D

18 U.S.C. 700

"(a) Whoever knowingly casts contempt upon any flag of the United States by publicly mutilating, defacing, defiling, burning, or trampling upon it shall be fined not more than $1,000 or imprisoned for not more than one year, or both.

"(b) The term 'flag of the United States' as used in this section, shall include any flag, standard, colors, ensign, or any picture or representation of either, or of any part or parts of either, made of any substance or represented on any substance, of any size evidently purporting to be either of said flag, standard, colors, or ensign of the United States of America, or a picture or a representation of either, upon which shall be shown the colors, the stars and the stripes, in any number of either thereof, or of any part or parts of either, by which the average person seeing the same without deliberation may believe the same to represent the flag, standards, colors, or ensign of the United States of America.

"(c) Nothing in this section shall be construed as indicating an intent on the part of Congress to deprive any State, territory, possession, or the Commonwealth of Puerto Rico of jurisdiction over any offense over which it would have jurisdiction in the absence of this section."

APPENDIX E

Uniform Flag Act

"§ 1. Definition.—The words flag, standard, color, ensign or shield, as used in this act, shall include any flag, standard, color, ensign or shield, or copy, picture or representation thereof, made of any substance or represented or produced thereon, and of any size, evidently purporting to be such flag, standard, color, ensign or shield of the United States or of this state, or a copy, picture or representation thereof.

"§ 2. Desecration.—No person shall, in any manner, for exhibition or display:

"(a) place or cause to be placed any word, figure, mark, picture, design, drawing or advertisement of any nature upon any flag, standard, color, ensign or shield of the United States or of this state, or authorized by any law of the United States or of this state; or

"(b) expose to public view any such flag, standard, color, ensign or shield upon which shall have been printed, painted or otherwise produced, or to which shall have been attached, appended, affixed or annexed any such word, figure, mark, picture, design, drawing or advertisement; or

"(c) expose to public view for sale, manufacture, or otherwise, or to sell, give or have in possession for sale, for gift or for use for any purpose, any substance, being an article of merchandise, or receptacle, or thing for holding or carrying merchandise, upon or to which shall have been produced or attached any such flag, standard, color, ensign or shield, in order to advertise, call attention to, decorate, mark or distinguish such article or substance.

"§ 3. Mutilation.—No person shall publicly mutilate, deface, defile, defy, trample upon, or by word or act cast contempt upon any such flag, standard, color, ensign or shield.

"§ 4. Exceptions.—This statute shall not apply to any act permitted by the statutes of the United States (or of this state), or by the United States Army and Navy regulations, nor shall it apply to any printed or written document or production, stationery, ornament, picture or jewelry whereon shall be depicted said flag, standard, color, ensign or shield with no design or words thereon and disconnected with any advertisement.

"§ 5. Penalty.—Any violation of Section Two of this act shall be a misdemeanor and punishable by a fine of not more than _____ dollars. Any violation of Section Three of this act shall be punishable by a fine of not more than _____ dollars, or by imprisonment for not more than ____ days, or by both fine and imprisonment, in the discretion of the Court.

"§ 6. Inconsistent Acts Repealed.—All laws and parts of laws in conflict herewith are hereby repealed.

"§ 7. Interpretation.—This act shall be so construed as to effectuate its general purpose and to make uniform the laws of the states which enact it.

"§ 8. Name of Act.—This act may be cited as the Uniform Flag Law.

"§ 9. Time of Taking Effect.—This act shall take effect -------- days after ---------."

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 72-714

CALIFORNIA, *Petitioner,*

VS.

THE MUNICIPAL COURT FOR THE SACRAMENTO MUNICIPAL COURT DISTRICT OF SACRAMENTO COUNTY, et al.,
Respondents.

On Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District

BRIEF IN OPPOSITION

Respondent Michael Alford appears by this Brief in Opposition and requests that the Court deny the Petition for Certiorari because petitioner has not set forth grounds which warrant issuance of the writ.

ARGUMENT

At issue is the validity of a California statute which has been authoritatively construed by the California Court of Appeal in an opinion which the California Supreme Court declined to review. This interpretation of the statute by the highest appellate Court which has construed it is binding on trial courts in California. *Auto Equity Sales v. Superior Court,* 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937 (1962). As construed, the statute clearly goes beyond an arguably permissible area of state control to embrace activities which are protected by the Constitution of the United States.

In such a situation this Court will determine the constitutionality of a state statute on the basis of the authoritative interpretation of the state courts. *Stromberg v. California,* 283 U.S. 359, 369, 51 S.Ct. 532, 75 L.Ed. 1117 (1930); *Cox v. Louisiana,* 379 U.S. 536, 551, 85 S.Ct. 453, 13 L.Ed.2d 471 (1964). Where a state Court, having authoritatively construed a state statute, erroneously concludes that the statute as construed is constitutional, this Court will overturn that conclusion to correct the error. *Stromberg v. California,* supra; *Cox v. Louisiana,* supra. However, this Court does not substitute its judgment for that of the state Courts to determine that state statutes found to be unconstitutionally broad should have been construed more narrowly. For this reason, the petition should be denied. However, certain points contained in the petition require comment.

The petition is misleading in that it states in several places that the California Court of Appeal held the flag *definition* statute (Section 611, California Military and Veterans Code) unconstitutional. This is incorrect. The Court of Appeal held the desecration statute (Section 614(d), Cal. Military and Veterans Code) unconstitutional because "as defined by Section 611 . . . it is void for overbreadth." *Alford v. Municipal Court,* 26 Cal.App.3d 244, 246, 102 Cal.Rptr. 667 (1972).

In arguing that the overbreadth doctrine should not have been applied here, the California Attorney General makes special reference to *Hoffman v. United States,* (D.C. Cir. 1971) 446 F.2d 226, and *Sutherland v. DeWulf,* (S.D. Ill. 1971) 323 F.Supp. 740. In *Hoffman* the United States Circuit Court of Appeals for the District of Columbia Circuit reversed a conviction of violating the federal flag desecration statute. Defendant's alleged criminal conduct consisted of "wearing a shirt which, while not actually a flag of the United States, resembled the flag sufficiently to come within the terms of the statute." *Hoffman v. United States,* supra, 446 F.2d at 227. The Court held that defendant's conduct did not come within the statute. *Id.* at 228.

Referring to the *Hoffman* case, the petition herein states: "Thus, the District of Columbia Circuit Court considers the federal flag definition statute, 18 U.S.C. § 700, which also includes pictures and representations as flags, as not being in violation of the over-

breadth doctrine." (*Petition for Writ of Certiorari*, p. 11.) This is incorrect. The Court specifically stated that it did not reach the constitutional question. *Hoffman v. United States, supra.* Thus, the *Hoffman* case does not support petitioner's contention that the overbreadth doctrine should not have been applied in the instant case.

In *Sutherland v. DeWulf,* supra, 323 F.Supp. 740, a three judge district Court refused to apply the overbreadth doctrine to an Illinois flag desecration statute. The Court first determined that the conduct of defendants—burning an American flag—did not enjoy first amendment privilege so as to make them immune from prosecution. The Court in *Sutherland* then contrasted that conduct with the privileged conduct of defendant in *Street v. New York,* 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969). *Sutherland* states at p. 748:

> We may assume, *arguendo,* that the statutory provision challenged in this case is susceptible of sweeping and improper application. That assumption would also apply to the statutory provision found in *Street.* It would seem to this court to be an anomaly, indeed, to apply the overbreadth doctrine in this case to void the statute where conduct of the parties challenging the statute is clearly not privileged, but to find the doctrine not applied in *Street* where the conduct of the person challenging a nearly identical statute was privileged . . .
>
> The majority opinion in *Street* gave no indication of why the overbreadth doctrine was not applied

there. This court does not presume to say, but it is clear that it was not an oversight.

The Court in *Sutherland* did not interpret *Street* properly. The reason the overbreadth doctrine was not applied in *Street* is that the Court was able to determine the case without reaching that issue. It reversed the conviction because the record indicated that defendant could have been convicted of violating the New York flag desecration statute because of his words alone.

Finally, the petition suggests that certiorari should be granted because there is a conflict between the Court of Appeal's decision in *Alford* and a decision by the Los Angeles Superior Court, sitting as the Appellate Division thereof, in *People v. Cowgill,* 274 Cal.App.2d Supp. 923, 78 Cal.Rptr. 853 (1969). The tribunal which decided *Cowgill* is inferior to that which decided *Alford,* and, to the extent the decisions are inconsistent, *Alford* supplants *Cowgill. Auto Equity Sales, Inc. v. Superior Court, supra.* It is worth noting in passing that the Superior Court judge's opinion in *Cowgill* contains language which is inconsistent with this Court's decision in *Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), since *Cowgill* asserts that the statute can be justified as preventing potential breaches of the peace, a concept disapproved in *Cohen. Id.* at 403, U.S. 24-25.

CONCLUSION

For the reasons stated above, respondent submits that the petition for Writ of Certiorari should be denied.

Dated, December 7, 1972.

Respectfully submitted,

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